

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

Bill Jones
SECRETARY OF STATE

Request for Regulatory)	1995 OAL Determination No. 1
Determination filed by the)	
CALIFORNIA)	[Docket No. 90-023]
MANUFACTURERS)	
ASSOCIATION regarding an)	February 22, 1995
alleged underground)	
regulation of the CALIFORNIA)	Determination Pursuant to
REGIONAL WATER QUALITY)	Government Code Section 11340.5;
CONTROL BOARD, LOS)	Title 1, California Code of
ANGELES REGION, used in)	Regulations, Chapter 1, Article 3
ratifying a cleanup and)	
abatement order ¹)	

Determination by: JOHN D. SMITH, Director

HERBERT F. BOLZ, Supervising Attorney
CRAIG TARPENNING, Senior Staff Counsel
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law finds that the record submitted is insufficient to show that the California Regional Water Quality Control Board, Los Angeles Region, established a standard of general application subject to the Administrative Procedure Act in its action to ratify a cleanup and abatement order.

36

THE ISSUES PRESENTED²

The Office of Administrative Law ("OAL") has been asked to determine³ whether, in ratifying a cleanup and abatement order pursuant to Water Code section 13304, the California Regional Water Quality Control Board, Los Angeles Region, ("Regional Board") established a standard of general application required to be adopted pursuant to the Administrative Procedure Act ("APA").⁴

THE DECISION^{5, 6, 7, 8}

The Office of Administrative Law finds that:

- (A) the Regional Board's quasi-legislative enactments are generally subject to the APA;
- (B) the record submitted is insufficient to show that the Regional Board adopted the challenged rule and thereby exercised quasi-legislative power in its ratification of Cleanup and Abatement Order 89-104, and thus no violation of the APA has been shown.⁹

REASONS FOR DECISION

I. THE APA AND REGULATORY DETERMINATIONS BY OAL

In *Grier v. Kizer*, the California Court of Appeal described the APA and OAL's role in its enforcement as follows:

"The APA was enacted to establish *basic minimum procedural requirements* for the adoption, amendment or repeal of *administrative regulations promulgated by the State's many administrative agencies*. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) Its provisions are applicable to the exercise of any quasi-legislative power conferred by statute (section 11346.) The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.2), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is *without legal effect*. (*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).

"In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.]¹⁰

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11340.5. That section, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted

pursuant to the APA. The section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (g) of Government Code section 11342. Subdivision (b) of section 11340.5 states as follows:

"If [OAL] is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to [the APA, OAL] may issue a determination *as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (g) of Section 11342.*" (Emphasis added.)

These provisions thus authorize OAL to determine whether a challenged rule is or is not a "regulation" that must be adopted pursuant to the APA. Notably, the provisions do not authorize OAL to prevent the use of a rule or policy declared to be an invalid "regulation" in violation of section 11340.5, or to impose penalties upon such use. Such authority rests with the courts.

Please note that effective January 1, 1995 the APA was substantially reorganized by Assembly Bill No. 2531 (Stats. 1994, c. 1039). The reorganization is reflected in any Government Code sections cited in this determination. Cross reference tables listing old and new section numbers and article headings, as well as a list of section numbers that remain unchanged, are included with this determination as exhibits A, B and C for your convenience.

II. THE RULEMAKING AGENCY INVOLVED HERE; ITS AUTHORITY; BACKGROUND OF THIS REQUEST FOR DETERMINATION

The Rulemaking Agency Named in this Proceeding

The position of State Engineer was created in 1878 to investigate problems of irrigation, drainage and navigation of rivers. The control of water quality grew and changed in succeeding years to keep pace with the burgeoning needs and technology of a more complex society. The

position of State Engineer changed over the years, going through restructuring and name changes, until the present State Water Resources Control Board was created by the Legislature in 1967 by combining the State Water Rights Board and the State Water Quality Control Board into one body.¹¹

For the purposes of water quality control, the state is divided into nine regions.¹² The Los Angeles Region is comprised of

" . . . all basins draining into the Pacific Ocean between the southeasterly boundary, located in the westerly part of Ventura County, of the watershed of Rincon Creek and a line which coincides with the southeasterly boundary of Los Angeles County from the ocean to San Antonio Peak and follows thence the divide between San Gabriel River and Lytle Creek drainages to the divide between Sheep Creek and San Gabriel River drainages.¹³

Each regional board consists of nine members who reside or have a principal place of business within the region. The members are appointed by the Governor pursuant to Water Code section 13201 based upon their association with specified interests or their competence in areas related to water quality problems.

Authority¹⁴

Water Code section 13001 of the Porter-Cologne Water Quality Control Act provides in part:

"It is the intent of the Legislature that the state board and each regional board shall be the principal state agencies with primary responsibility for the coordination and control of water quality"

The regional boards are empowered to pursue the prevention and abatement of water pollution within their respective jurisdictions.¹⁵

The Request for Determination

"The case that underlies this Request for Determination involves HR Textron, a manufacturer located within the

Region, that operated an underground storage tank system for twenty years until 1984, when it was discovered to be leaking solvents, freon, and hydrocarbons. In the HR Textron case, staff of the Regional Board, under authority of Water Code section 13304 issued a Cleanup and Abatement Order [No. 89-104] to the discharger on December 18, 1989, requiring that, among other things, it install a groundwater monitoring well to investigate the extent of probable pollution. HR Textron appealed the Order to the nine-member Regional Board. The appeal was heard by the Board on two separate dates, and on April 23, 1990, the Regional Board voted to ratify the Order."¹⁶

This Request for Determination, filed by the California Manufacturers Association (CMA), alleges that, in ratifying Cleanup and Abatement Order 89-104, the California Regional Water Quality Control Board, Los Angeles Region, (Regional Board):

"... established a rule of general application whereby in any soil contamination case resulting from a release from an underground storage tank of contaminants into soil below grade, groundwater monitoring shall automatically be required in a Cleanup and Abatement Order pursuant to Cal. Water Code section 13304."¹⁷

III. DISCUSSION

Key Issues Regarding the Determination

- A. Whether the APA is generally applicable to the Regional Board's quasi-legislative enactments.**
- B. Whether the challenged action reflects the exercise of quasi-legislative power.**
- C. Whether the challenged action constitutes a "regulation" within the meaning of the key provision of Government Code section 11342(g).**
- D. Whether any challenged action found to constitute a**

"regulation... is exempted by statute from compliance with APA requirements.

A.

The APA is generally applicable to the Regional Board's quasi-legislative enactments.

Government Code section 11000 states in part:

"As used in this title [Title 2, 'Government of the State of California'] '*state agency*' includes every state office, officer, department, division, bureau, *board* and commission."
(Emphasis added.)

This statutory definition applies to the APA: i.e., it helps us determine whether or not a particular "state agency" is subject to APA rulemaking requirements. Section 11000 is contained in Title 2, Division 3 ("Executive Department"), Part 1 ("State Departments and Agencies"), Chapter 1 ("State Agencies") of the Government Code. The rulemaking portion of the APA is also found in Title 2 of the Government Code: to be precise, it is Chapter 3.5 of Part 1 of Division 3.

The Regional Board, a "state . . . board," is clearly a "state agency" as that term is defined in Government Code section 11000.

The APA somewhat narrows the broad definition of "state agency" given in Government Code section 11000. In Government Code section 11342, subdivision (g), the APA provides that the term "state agency" applies to *all* state agencies, *except* those in the "judicial or legislative departments."¹⁸ Since the Regional Board is not in the judicial or legislative branch of state government, we conclude that APA rulemaking requirements generally apply to its quasi-legislative enactments.¹⁹

Moreover, Water Code section 13222 provides:

"Pursuant to such guidelines as the state board may establish, each regional board shall adopt regulations to carry out its powers and duties under this division."

Title 23, California Code of Regulations, section 649, subsection (a) and section 649.1, concerning rulemaking proceedings by the state and regional boards, specifically require "regulations" to be adopted pursuant to the APA:

"649. Scope

(a) 'Rulemaking proceedings' shall include any hearings designed for the *adoption*, amendment, or repeal of any rule, *regulation, or standard of general application*, which implements, interprets or makes specific any statute enforced or administered by the State and Regional Boards.

649.1 Rulemaking Proceedings

Proceedings to adopt *regulations*, including notice thereof, shall, as a minimum requirement, comply with all applicable requirements established by the Legislature (Government Code Section 11340, et seq.) [the APA]. This section is not a limitation on additional notice requirements contained elsewhere in this chapter." (Emphasis added.)

A specific portion of the California Code of Regulations has been reserved for regulations adopted by regional boards.

Since the time of this request for determination, the APA has been amended specifically in regards to the water quality area.²⁰

Government Code section 11352 exempts from the APA the issuance, denial or waiver of any water quality certification (as authorized under Water Code section 13160) or waste discharge requirements and permits (pursuant to Water Code sections 13263 and 13377) and waivers issued pursuant to Water Code section 13269. Subdivision (a) of Government Code section 11353 also exempts the adoption or revision of state policy for water quality control and the adoption or revision of water quality control plans and guidelines pursuant to Division 7 (commencing with section 13000) of the Water Code. However any policy, plan, or guideline the State Water Resources Control Board adopted after June 1, 1992, or that a court determines is subject to this part of the APA after

June 1, 1992, must comply with alternative rulemaking requirements pursuant to subsection (b) of Government Code section 11353. Also, the exemption in subdivision (a) of Government Code section 11353 does not apply to a provision of any policy, plan, guideline, or revision, as applied to any person who, as of June 1, 1992, was a party to a civil action challenging that provision on the grounds that it has not been adopted in a regulation pursuant to the APA.²¹

Pursuant to Government Code section 11353, policies and procedures for the investigation, cleanup and abatement of discharges under Water Code section 13304 became operative on July 8, 1994.²²

B.

The record does not show that the Regional Board exercised quasi-legislative power in the challenged action.

The Regional Board did not contest that its quasi-legislative enactments are subject to the APA, but contended that the challenged action ". . . constitutes 'quasi-judicial' action involving only the specific facts of the HR Textron case." It argued that ". . . the issuance of the cleanup and abatement order in the underlying matter is a decision on the technical merits, supported by substantial evidence, in a unique and specific matter brought before it . . ." and is ". . . an exercise of quasi-judicial authority not subject to the APA"²³

Section 11346 of the Government Code provides in pertinent part:

"It is the purpose of this chapter to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this article are applicable to the exercise of any *quasi-legislative* power conferred by any statute . . ."
[Emphasis added.]

Since the term "quasi-legislative" is not defined in the California APA, we look to the judicial definition of the term to determine whether the challenged action reflects the exercise of quasi-legislative power. In *San Diego Bldg. Contractors Assn. v. City Council*²⁴ the California Supreme Court determined that the enactment of a general zoning ordinance under

the initiative process was "legislative" in nature. The court found that a legislative action involves the adoption of a "... broad, generally applicable rule of conduct ..." as opposed to when "... the government's action affecting an individual is determined by facts peculiar to the individual case."²⁵ In *Horn v. County of Ventura*²⁶ the court applied this distinction to find the approval by a county of a subdivision as adjudicatory.

"Subdivision approvals, like variances and conditional use permits, involve the application of general standards to specific parcels of real property. Such governmental conduct, affecting the relatively few, is 'determined by facts peculiar to the individual case' and are 'adjudicatory' in nature."²⁷

In *Pacific Legal Foundation v. Cal. Coastal Commission*²⁸ the court found certain guidelines adopted by the Coastal Commission interpreting the access provisions of the 1972 Coastal Act to be quasi-legislative. In so finding, the court described the distinction between quasi-legislative and quasi-judicial actions:

"The guidelines are the formulation of a general policy intended to govern future permit decisions, rather than the application of rules to the peculiar facts of an individual case."²⁹

CMA has alleged that:

"The Regional Board established a rule of general application whereby in any soil contamination case resulting from a release from an underground storage tank of contaminants into soil below grade, groundwater monitoring shall automatically be required in a Cleanup and Abatement Order pursuant to Cal. Water Code section 13304. The effect of the rule is that in each and every underground storage tank release case, regardless of whether the specific facts of the case support such extraordinary action by a responsible party, groundwater monitoring shall be required."³⁰

The proceeding during which CMA alleges the Regional Board established the rule which is the subject of this Request for a

Determination was a hearing on a requested modification to a cleanup and abatement order issued by the Regional Board pursuant to section 13304 of the Water Code. Subdivision (a) of Water Code section 13304 provides in pertinent part:

"Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts."

Specifically, the Cleanup and Abatement Order 89-104 directed HR Textron (HRT) to cleanup and abate the effects of wastes discharged into soil and/or groundwater at its Pacoima facility and, in part, accepted the soils remediation plan submitted by HRT on the condition " . . . that groundwater monitoring wells are installed."³¹ The issue at the hearing was the necessity of drilling these monitoring wells. The hearing was conducted over a two day period and included extensive testimony from various expert witnesses from both sides of the controversy as to the nature of the particular physical situation at the site: the properties of the particular wastes discharged, the peculiar soil characteristics underlying the leaking tanks, the particular hydrology and geology at the site and the affected groundwater basin, the depth of the groundwater, the significance of the leak at the site, etc. All of the testimony and discussion on the record concerned this particular cleanup and abatement order and site. Although certainly not binding on OAL in this determination, it is perhaps worth noting that both of the parties to the hearing itself were in agreement as to the nature of the proceeding and expressed their understanding in the record:

Michael Hickok (counsel for HRT):

"Our understanding of the record and of the statute is the decisions on whether to drill the groundwater are site specific, that we are not here in a situation where there is a policy for all sites and all drilled groundwater. And I just want to make sure that that's the basis on which this record is proceeding. The rights now are solely site specific to the tank release in this case; is that correct?"

Robert Ghirelli (executive officer for the Regional Board):

"That is correct."³²

In this Request for Determination, CMA has pointed to statements made by a Regional Board member at the April 23, 1990 hearing prior to making a motion to ratify the groundwater monitoring requirements contained in Cleanup and Abatement Order 89-104.

"I think that the appellant does make a reasonable case in the face of policy and getting his corporate point of view across. But I think we have to look at a different standard and for a different purpose.

There were five or six points that were mentioned by the attorney: no data beyond the clay barrier, an area-wide problem, not cost-effective, unreasonably burdensome, and the fact that this is a regional problem.

Those comments address many things, but they don't address the basic question with regards to that which was brought up by -- for lack of a better name, I will call him Watermaster II -- Mr. Mann. And his argument and comments, I think, were very persuasive."³³

Although the Board member did not clarify what was meant by a "different standard," CMA points to the fact that the Board member referred to the testimony of John F. Mann (court appointed Watermaster to the Puente Basin) as "very persuasive." CMA reasons that the Regional Board has "... promulgated an

'underground regulation' to the effect that any contaminant release into soil necessitates groundwater monitoring" based upon the following excerpt selected from Mr. Mann's testimony:

"I will say this: I don't believe the state of the art allows the conclusion from sampling merely in the clay zone, which this whole problem involves. That doesn't answer the question. What we need is one or more wells to groundwater, and then an actual sample of groundwater to find out if the pollutants are in there. I don't think it's possible to sift data taken perhaps 100 feet above the water table, and make a firm conclusion that the water didn't get there, that the pollutants didn't get to the water."³⁴

OAL concludes that the record submitted is insufficient to show that the Regional Board stepped outside of an otherwise quasi-judicial proceeding involving a particular cleanup and abatement order to adopt a general policy intended to govern future permit decisions. Initially, it must be noted that it is not entirely clear from the record what the Board member was referring to in making reference to a "different standard." The standard, if any, was not clearly identified. With respect to the excerpt of Mr. Mann's testimony submitted by CMA as the challenged standard, OAL cannot ignore the rest of Mr. Mann's testimony and is compelled to look at the entire record. The above-quoted excerpt occurred as part of extensive testimony as to the particular nature of the soil conditions, hydrology and geology at the site which gave rise to the difficulty in ascertaining whether the materials leaked had reached, or will reach, the groundwater.³⁵ Given the context in which this quoted excerpt was made, it is not clear that Mr. Mann's statement was intended to have any application outside of the particular site being discussed. In addition, it is not apparent from the record that the Regional Board adopted CMA's quoted excerpt from Mr. Mann's testimony as a rule under which this cleanup and abatement order and future permit decisions were to be rendered. There were no findings made at the hearing or other evidence in the record that the Regional Board established or relied on such a rule. Alternatively, there is no evidence in the record that the Regional Board has in fact applied this "rule" in other permit decisions.

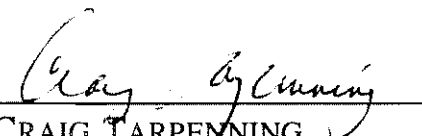
Based upon the record as submitted, we are unable to conclude that the Regional Board established the challenged rule in its action to ratify Cleanup and Abatement Order 89-104. The exercise of purely quasi-judicial authority by the Regional Board is not subject to the rulemaking requirements of the APA. For this reason, we do not reach issues C and D.

IV. CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) the Regional Board's quasi-legislative enactments are generally subject to the APA;
- (2) the record submitted is insufficient to show that the Regional Board adopted the challenged rule and thereby exercised quasi-legislative power in its ratification of Cleanup and Abatement Order 89-104, and thus no violation of the APA has been shown.

DATE: February 22, 1995


CRAIG TARPENNING
Senior Staff Counsel

Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814-4602
(916) 323-6225, CALNET 473-6225
FAX No. (916) 323-6826
Reference Attorney (916) 323-6815

1. This Request for Determination was filed by Michael J. Loring, General Counsel, California Manufacturers Association, 1121 L Street, Suite 900, Post Office Box 1198, Sacramento, California 95805 (916) 441-5420. The California Regional Water Quality Board, Los Angeles Region, was represented by Jorge A. Leon, 901 P Street, Sacramento, California 95814 (916) 657-2428.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year. e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "1." (This determination is the first published in 1993.) Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

This determination may be cited as "**1995 OAL Determination No. 1** (Regional Water Quality Control Board).

2. The legal background of the regulatory determination process--including a survey of governing case law--is discussed at length in note 2 to **1986 OAL Determination No. 1** (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, review denied (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a *second* survey of governing case law was published in **1989 OAL Determination No. 13** (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a *third* survey of governing case law was published in **1990 OAL Determination No. 12** (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code Section 11347.5, and the second opinion issued afterwards.

In January 1992, a *fourth* survey of governing case law was published in **1992 OAL Determination No. 1** (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be enforced unless duly adopted.

In December 1993, a *fifth* survey of governing law was published in **1993 OAL Determination No. 4** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register 94, No. 2-Z, page 61, note 3.

In December 1994, a *sixth* survey of governing law was published in **1994 OAL Determination No. 1** (Department of Education, December 22, 1994, Docket No. 90-021), California Regulatory Notice Register 95, No. 3-Z, page 94, note 3.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

"'*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA." (Emphasis added.)

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid and unenforceable* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*").

4. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370) and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, *the Administrative Procedure Act*." (Emphasis added.)

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the

The rulemaking portion of the APA and all OAL regulations are both reprinted and indexed in the annual APA/OAL regulations booklet "**California Rulemaking Law**," which is available from OAL (916-323-6225). The January 1995 revision is \$3.50 (\$6.40 if sent U.S. Mail).

5. OAL Determinations Entitled to Great Weight In Court

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been asked to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987). The *Grier* court concurred with OAL's conclusion, stating that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) (now subd. (g)). [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted to the court for consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]" [Citations.] [Par.] Because [Government Code] section 11347.5 (now 11340.5), subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) (now subd. (g)), *we accord its determination due consideration.*" [*Id.*; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "*entitled to due deference.*" [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of **1990 OAL Determination No. 4** (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory

6. *Note Concerning Comments and Responses*

In order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response."

If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

7. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) Of course, an agency rule found to violate the APA could also simply be rescinded.
8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
9. Government Code section 11340.5 provides:
 - "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.
 - "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (g) of Section 11342.

- "(c) The office shall do all of the following:
- "1 File its determination upon issuance with the Secretary of State.
 - "2. Make its determination known to the agency, the Governor, and the Legislature.
 - "3. Publish its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
 - "4 Make its determination available to the public and the courts.
- "(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.
- "(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:
- "1. The court or administrative agency proceeding involves the party that sought the determination from the office.
 - "2. The proceeding began prior to the party's request for the office's determination.
 - "3 At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (g) of Section 11342."

[Emphasis added.]

10. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249, review denied.
11. Stats. 1877-78, chapter 429; Stats. 1967, chapter 284; Water Code, article 3, chapter 2, division 1.
12. Water Code, sec. 13200.
13. Water Code, sec. 13200, subd. (d).

14. *OAL does not review alleged underground regulations for compliance with APA's six substantive standards*

We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. (Of course, as discussed in the text of the determination, the APA itself applies to all Executive Branch agencies, absent an express statutory *exemption*.) If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. *OAL does not* review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions *from a specific rulemaking agency* will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

15. Water Code, sections 13225, 13301 and 13304.
16. Agency Response, pp. 1-2.
17. Request for Determination, p. 3.
18. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11340.5. See also *Auto and Trailer Parks*, 27 Ops. Cal. Atty. Gen. 56, 59 (1956). For a thorough discussion of the rationale for the "APA applies to all agencies" principle, see **1989 OAL Determination No. 4** (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp.

1989 OAL Determination No. 4 was upheld by the California Court of Appeal in *State Water Resources Control Board v. Office of Administrative Law* (1993) 12 Cal.App.4th 697, 16 Cal.Rptr. 2d 25, rehearing denied, Feb. 19, 1993.

19. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
20. Stats. 1992, c. 1112 (AB 3359) sec. 1.
21. Government Code, sec. 11353(c).
22. Cal.Code Regs., tit. 23, section 2907.
23. Agency Response. p.3.
24. (1974) 13 Cal. 3d 205, 118 Cal. Rptr. 146.
25. Pp. 212, 213, 118 Cal. Rptr. p. 150.
26. (1979) 24 Cal. 3d 605, 156 Cal. Rptr. 718.
27. 24 Cal.3d at 614, 156 Cal. Rptr. at 722.
28. 33 Cal. 3d 164, 188 Cal. Rptr. 104.
29. 33 Cal.3d at 168, 188 Cal. Rptr. at 111.
30. Request for Determination, p. 3.
31. Cleanup and Abatement Order 89-104, par. 11.
32. Transcript of March 26, 1990 hearing, p. 28, lines 8-16.
33. Transcript of April 23, 1990 hearing, p. 131.
34. Request for Determination, p. 6; transcript of April 23, 1990 hearing, p. 108.
35. Transcript of April 23, 1990 hearing (Mr. Mann's testimony occurred at pp. 106-110).